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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KENNETH P. ZAUBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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February 27, 1989

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Petitioner Kenneth P. Zauber respectfully submits this brief in response to the government's opposition[1] to his petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third

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[1] Brief For The United States In Opposition ("Opp.").

Circuit, affirming his conviction for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d). As demonstrated in our petition, the Court of Appeals erroneously affirmed petitioner's RICO conviction notwithstanding the fact that in returning its general verdict on that count, the jury might have relied on predicate acts of mail and wire fraud that the Court of Appeals struck as legally defective under McNally v. United States, 107 S.Ct. 2875 (1987).

ARGUMENT

One of several questions posed in this petition is whether a charge of conspiracy to violate section 1962(c) of the RICO statute requires that the government prove that the defendant agreed to participate himself in two or more predicate acts of racketeering, or, on the other

hand, whether the government need only prove that the defendant agreed that members of the conspiracy would commit such acts. The Third Circuit's decision rests on the latter, more expansive, interpretation of section 1962(d): Thus, the Court of Appeals upheld the jury's verdict with no assurance that petitioner was found to have agreed to participate personally in two or more valid acts of racketeering. Had petitioner been tried in the First or Second Circuit, his RICO conviction would have been reversed; unlike the Third Circuit and several other Courts of Appeals,[2] those two Circuits have declared that a conviction for conspiracy to violate section 1962(c) requires that the jury find that the defendant agreed to participate himself in two or more acts of

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[2] See cases cited in Zauber's Petition For Writ Of Certiorari ("Pet."), at pp. 24-25.

racketeering activity. See United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

The government's opposing brief in no way undermines petitioner's showing as to the need for resolution of this conflict among the Circuits. First, the government claims that "[t]hat question is not properly before this Court . . . because petitioners did not object to the RICO conspiracy instruction in the district court and thus have waived the issue." (Opp. 9). The government's waiver argument overlooks the language of the trial court's instructions to the jury: Simply put, petitioner had no reason to object, as the charge was far more favorable to the defense than was the

controlling law in the Third Circuit. See United States v. Adams, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 906 (1985) (defendant need not agree to commit two acts of racketeering).

After charging the jury in conformity with the Third Circuit's decision in Adams, the trial court instructed: "Insofar as each of the three defendants in this case is concerned, the government must prove beyond a reasonable doubt that he agreed to the commission of at least two of the racketeering acts charged as to him in paragraph 4 of Count 1." (A32 n.17,[3] quoting Jt. App. at 1002) (emphasis added). Paragraph 4 of Count 1 charges that petitioner participated in acts of racketeering separate and apart from those charged as to his co-defendants; indeed, the racketeering acts charged as to

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[3] "A" refers to pages in the Appendix to Zauber's petition.

petitioner are set forth in a separate subdivision of paragraph 4. (See A49-52). As the Third Circuit acknowledged, the trial court's further instruction "could be read to imply that each defendant must agree to personally commit the racketeering act" (A32 n.17) -- contrary to the Adams decision. Hence, petitioner understandably did not object to an instruction that, given Third Circuit precedent, "prejudiced the government, not these defendants . . . ." (A32 n.17). In these circumstances, petitioner cannot be said to have waived a claim that did not arise until the Third Circuit rendered its decision in this case.

In addition to its waiver argument, the government seeks to minimize the Courts of Appeals' decisions in Ruggiero and Winter, which require that RICO conspirators agree to participate in two

or more predicate acts of racketeering. Contrary to the government's claim (see Opp. 10), the Second Circuit's analysis of the RICO conspiracy issue was necessary to its decision in Ruggiero. In seeking to sustain the RICO conspiracy conviction of defendant Tomasulo, despite the invalidity of one of two predicate acts in which he was alleged to have participated, the government in Ruggiero expressly argued that "it is sufficient that Tomasulo was found to have conspired with others to engage through an enterprise in a pattern of racketeering consisting of predicate acts committed by others." 726 F.2d at 921. The Second Circuit rejected this "extremely broad interpretation of RICO" and reversed Tomasulo's conviction. Id.

The government now blithely asserts that "the Second Circuit might well reconsider its decision on this issue when

presented with an opportunity to do so." (Opp. 11). The government's unfounded speculation ignores the fact that the Second Circuit has reaffirmed its reasoning in Ruggiero. See United States v. Teitler, 802 F.2d 606, 612 (2d Cir. 1986).[4] In short, Ruggiero remains the law of the Second Circuit, and has been consistently followed by courts in that Circuit. See, e.g., Zola v. Gordon, 685 F. Supp. 354, 377 (S.D.N.Y. 1988); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1440 (E.D.N.Y. 1988); Gruber v. Prudential-Bache Securities, Inc., 679 F. Supp. 165, 178 (D. Conn. 1987).

[4] Similarly, the First Circuit has not retreated from its interpretation of RICO conspiracy, as pronounced in Winter. See United States v. Torres Lopez, 851 F.2d 520, 528 (1st Cir. 1988); United States v. Angiulo, 847 F.2d 956, 964 (1st Cir.), cert. denied, 109 S.Ct. 138 (1988).

In reaffirming Adams, the Third Circuit's decision in Zauber rejects the theory adopted by the Courts in Ruggiero and Winter. Such a fundamental conflict ought to be resolved by this Court, particularly in light of other important issues presented in this case. As discussed more fully in our petition, the rationale of Stromberg v. California, 283 U.S. 359 (1931), further mandates that petitioner's RICO conviction be reversed, inasmuch as the jury might have relied on the invalid mail and wire fraud predicate acts -- and, given its verdicts on the substantive fraud counts, probably did rely on those defective allegations. Moreover, by sustaining petitioner's RICO conspiracy conviction on the basis of a pattern of racketeering activity consisting of a single criminal objective, without more, the Third Circuit's decision

in Zauber eviscerates the pattern-of-racketeering requirement[5] and threatens to eradicate the distinctions between section 1962(d) and the general conspiracy statute. This Court should review and reject such a profound reworking of the RICO statute.

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[5] Petitioner argued in the Court of Appeals that the proof fell short of establishing the requisite pattern of racketeering activity. The Third Circuit's striking of the fraud allegations further undermines the jury's finding on this essential element.

A related issue is currently before this Court in H.J., Inc. v. Northwestern Bell Tel. Co., cert. granted, Dkt. No. 87-1252 (March 21, 1988).

CONCLUSION

For the reasons stated above, and in our petition, we respectfully request that a writ of certiorari be granted so that this Court may consider the serious issues of federal law presented by this case.

February 27, 1989

Respectfully submitted,

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